SEP 1 1 1956
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 321

[redacted], Petitioner

vs.

TEXAS & PACIFIC RAILWAY COMPANY, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE [redacted] CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

* * *

NO.....

RUBY NELL THOMSON, *Petitioner*

VS.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

BRIEF OF RESPONDENT IN OPPOSITION

* * *

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

Petitioner's application correctly sets forth the opinions below.

JURISDICTION

The Court of Appeals below did not render a decision in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals did not pass upon the weight and credibility of evidence. It merely passed upon the question of whether there was *any* evidence of negligence and proximate cause.

STATUTES INVOLVED

Petitioner's application correctly sets forth the applicable statutes involved.

STATEMENT OF THE CASE

Many of the statements contained in petitioner's statement of the case are not supported in the evidence. The opinion of the Honorable Court of Appeals, 232 F. 2d 313, 314-16 (petitioner's application, pp. 17-23) clearly and precisely sets forth the evidence taken in a light most favorable to petitioner.

COUNTERPOINT I

The mere fact that petitioner was injured at the time she was performing the usual and ordinary functions of her position does not establish any evidence of negligence.

ARGUMENT

The petitioner had worked for respondent as an agent and operator for some time. Handling mail was normally part of such employee's job all up and down the line (R. 43). Petitioner herself had worked many trains prior to her injury, and it was usual, necessary and part of her regular duties (R. 54-55). She had even worked at this same station before and knew the job entailed handling the mail before she bid for this job (R. 49). She had never had any difficulty in performing her duties, including handling the mail, before the instance in question.

She alleged that she had a conversation with her superior prior to this time in which she told him that the work was too strenuous for her (R. 11-12), but upon the trial petitioner herself testified that the only conversation she had with her superior was to the effect that she could not wear skirts and hose and

handle the mail (R. 21). It was the policy that women should wear skirts and hose if they could still perform their duties (R. 54-55), but in this instance her duties included the handling of mail in which she had to crawl on and about the mail carts or "trucks" as they are called in the railroad industry. She furthermore testified that she had never informed anyone of the fact that her duties were too strenuous for her.

Briefly the duties of petitioner in handling the mail were as follows:

The postal employees bring the mail to the station where they load it up on four-wheel carts which in railway parlances are known as "trucks". A picture of such a truck being shown in Defendant's Exhibit No. 1 (R. 46). This truck is in the mailroom which is locked. The operator gets the key to the mailroom, pulls the truck out onto the station platform, and when the train stops, pulls the truck alongside the railway post office car, climbs upon the truck and transfers the mail on the truck to the railway post office car by handing the mail sacks to the railway post office man. The railway post office man then transfers the mail from the railway post office car destined for the particular station onto the truck by handing the mail sacks to the operator on the truck. The operator on the truck, when this operation is completed, pulls the truck off away from the train.

Respondent recognizes that the F. E. L. A. is in all respects to be liberally construed in favor of the employee and all doubts as to the weight and credibility of the evidence resolved in favor of such employee. But there is no question of interpreting the evidence

or drawing conclusions therefrom in the instant case. Petitioner's own testimony, uncontradicted and conclusive, established that she had never requested assistance or claimed the work to be too strenuous for her.

This Honorable Court has repeatedly held in speaking of the Federal Employers Liability Act, that it did not make the employer the insurer of the safety of its employees while they are on duty. See *Ellis vs. Union Pacific Ry. Co.*, 329 U.S. 649, 653; 67 S. Ct. 598, 600; 91 L. Ed. 572 (1947). This Court has furthermore held that when the evidence is such that without weighing the credibility of the witnesses and the weight of the evidence, there can be but one reasonable conclusion, the court should determine the proceedings by nonsuit, directed verdict or otherwise. *Brady vs. Southern Ry. Co.*, 320 U.S. 476; 64 S. Ct. 232; 88 L. Ed. 239.

The discussion petitioner had with her superior in regard to wearing of skirts and hose did not in any manner call the attention of her superior to the fact that the work might be too strenuous for her. See *Cartwright vs. Atchison, T. & S. F. R. Co.*, 228 F. 872 (1915).

Two recent cases directly in point have been found by respondent. In *Wadiak vs. Ill. Central Ry. Co.*, 208 F. 2d 925 (1953), an employee was injured in attempting to lift a 300 pound barrel. The evidence there, as here, showed that he had not requested assistance; and furthermore, there, as here, the railroad did not know of the weight of the object to be lifted or handled. The Court of Appeals held, at page 929:

> "In the absence of proof that such aid was sought and was denied to him, or that any need

for help was brought to defendant's notice, plaintiff cannot rely upon this contention."

Another F. E. L. A. case in point is *Louisville vs. Green*, 255 Ala. 642, 53 So. 2d 358 (1951). In that case an employee was also injured while handling mail and loading it upon a truck similar to the one in the instant case. The evidence showed that the employee had never complained to the railroad that the work of lifting the sacks was too heavy for him. The court properly denied recovery because this very important element of lack of notice was missing from the evidence.

It must furthermore be remembered that the railroad would have no way of knowing of the number of sacks or the weight of any particular sack on this occasion inasmuch as this was controlled by employees of the United States Post Office, not under the control of respondent and without respondent being able to obtain any knowledge thereof.

There was no reason for respondent, its agents, servants or employees to foresee that any injury might occur from merely performing the identical duties petitioner was performing inasmuch as the same thing was being done by similar employees all the way up and down the line each day, and petitioner had said herself, on many, many occasions had performed the identical duties.

The cases by this Honorable Court cited by petitioner in her petition for writ of certiorari which deal with straining or insufficient help are clearly distinguishable on the facts.

In *Stone vs. New York & Chicago Railroad Co.*, 73 S. Ct. 358; 344 U.S. 407; 98 L. Ed. 441 (1953), the

injured employee and another were trying to remove railroad ties, and were having a great deal of difficulty. The injured man complained that he could not pull any harder and that more men were needed, whereupon the foreman told him that if he couldn't pull any harder the foreman would get somebody that would. Thus the railroad was given actual notice and disregarded the notice, ordering the worker to continue, and as a result he was injured. This properly presented a jury issue.

The other case cited by petitioner is *Blair vs. Baltimore & Ohio R. Co.*, 323 U.S. 600; 65 S. Ct. 545; 89 L. Ed. 490 (1945) wherein a man was injured while being required to carry pipes with insufficient help. There, again, the injured employee told his supervisor that the pipes were heavy and greasy, and that more men were required in order to carry these pipes. The supervisor overrode this contention and as a result, one of the pipes was dropped and injured the complaining employee. Again the railroad had notice and when the foreman's order overrode the worker's complaint this presented a jury question of negligence.

Merely requiring an employee to do the usual and customary work required of persons in that line of employment are required by the character of the business is not negligence. See *Great Atlantic & Pacific Tea Co. vs. Evans*, 175 SW 2d 249 (Tex. S. Ct.) (1943). There was no evidence even intimated that petitioner was doing any work other than her normal and customary duties and the normal and customary duties of other persons similarly employed up and down the line. There was no way in which respondent could

reasonably foresee that petitioner would be injured in performing the same duties she had performed many, many times.

COUNTERPOINT II

The Court of Appeals did not violate any rules of substance or procedure laid down by this Honorable Court.

ARGUMENT

We are not here faced with a procedural question on a variance between the pleadings and the proof. The Court of Appeals properly held that as a matter of substantive law, she failed to establish a cause of action for the reasons pointed out in Counterpoint I.

Petitioner went to trial upon one theory of the case and one theory only. Her proof wholly failed in this. However, the Court nevertheless instructed upon this theory of the case. Petitioner did not request any additional or different charges or except to the charge as given (R. 221). It is upon this theory that the petitioner's cause must rest or fall, and upon no other theory.

Rule 51, Federal Rules of Civil Procedure, provides in part: "No party may assign as error the giving or the failure to give an instruction unless he object thereto before the jury retires to consider its verdict . . ." Petitioner did not advance any other possible theory of recovery in the trial court so that the jury might have been instructed thereon, nor did she object to the instruction of the Court to the jury as not covering any possible ground of recovery.

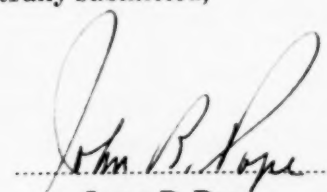
The Court of Appeals correctly decided this case upon the merits and its opinion was based upon substantive law, namely, that the failure of petitioner to apprise respondent that the work was too strenuous for her, when it was not obviously so, was fatal to her cause of action.

Petitioner even in her petition in this court does not set forth any other theory under which she might recover.

CONCLUSION

The clear and precise opinion of the Circuit Court accurately sets forth the fact in a light most favorable to petitioner's cause and clearly and properly pronounces the law applicable thereto. We, therefore, submit that petitioner's application for writ of certiorari should be denied.

Respectfully submitted,



JOHN B. POPE
Attorney for Respondent
WAGSTAFF, HARWELL,
ALVIS & POPE
Of Counsel.

I hereby certify that a copy of the above and foregoing reply to the application for certiorari was served upon Messrs. Dallas Scarborough and Davis Scarborough, attorneys of record for petitioner, by delivering same to them by hand this 10th day of September, 1956.

John B. Pope

JOHN B. POPE
Attorney for Respondent

FEB 21 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 721

[redacted]

Petitioner,

vs.

[redacted]

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF ON THE MERITS

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

* * *

No. 321

* * *

RUBY NELL THOMSON, *Petitioner*

VS.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

BRIEF FOR THE PETITIONER

* * *

OPINION BELOW

The opinion of the Court of Appeals (R. 186) is reported in 232 F. 2d 313, (5 C. A. 1956).

JURISDICTION

The judgment of the Court of Appeals was entered on 25 April 1956. Petition for Rehearing was denied by that Court on 24 May 1956.

On 15 August 1956, Petition for Writ of Certiorari was filed and was granted on 22 October 1956. The jurisdiction of this Court is found in C 646 Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

In cases arising under the Federal Employers' Liability Act, is not the jury the sole body to pass on questions of negligence of the employer proximately causing the injury?

1. The direct order to Petitioner to handle the mail alone in violation of custom and the foreseeable consequences of that order were factors which the jury, and not the Appellate Court, should evaluate.

2. The strict limits applied by the Court of Appeals to Petitioner's cause of action violate the rules of substance and procedure laid down by this Court.

STATUTES INVOLVED

The statutory provisions under which this case arises and which are controlling are:

1. The Federal Employers' Liability Act. 45 U. S. C. A. § 51 (April 22, 1908, c. 149). § 1, 35 Stat. 65; (August 11, 1939, c. 685, 53 Stat. 1404). "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then the next of kin dependent upon such employee for

such injury or death resulting in whole or in part from negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, Section 1, 35 Stat. 65; August 11, 1939, c. 685, Section 1, 53 Stat. 1404.

2. 45 U. S. C. A. Section 53, 22 April 1908, c. 149, Sec. 3, 35 Stat. 66. "In all actions hereafter brought against any such common carrier railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar the recovery, but the damages shall be diminished by the jury in proportion to amount of negligence attributable to such employee; *provided*, that no such employee who may be injured or killed shall be held to be guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of any employees contributed to the injury or death of such employee."

3. 45 U. S. C. A. Section 54, Apr. 22, 1908, c. 149, Section 4, 35 Stat. 66; August 11, 1939, c.

685, Section 1, 53 Stat. 1404. "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE

Ruby Nell Thomson was employed by the Texas and Pacific Railway Company on 5 September 1951, in the capacity of an agent operator (R. 13). When she first went to work, she worked on the "extra board" which meant that she was shifted from station to station on the railroad line filling in vacancies created by vacations or sick leave. She worked on the "extra board" until the first of October 1952, at which time she bid for and received by reason of her seniority a regular assignment as agent-operator at Monahans, Texas. She was to work the shift from twelve midnight until eight in the morning, handling train orders, telegrams, selling tickets, general clerical work, and in addition, any duties which her superior at that station saw fit to assign her. (R. 14). In assuming her duties at Monahans Petitioner was transferred from one division of the railroad to another division. In the division from which she had been transferred, women employees had been told to wear skirts and hose and dress

as a woman normally would. (R. 15). Upon being transferred to the division in which Monahans was located, she discussed this question of dress with the assistant superintendent of the western division and was instructed that it was all right for her to wear feminine attire as long as her duties were performed satisfactorily. (R. 15, 16). This made it impossible for her to climb up on the mail carts and handle the mail. (R. 16). When she assumed her duties at Monahans, a Mexican laborer named Vasquez was handling the mail, and he continued to handle the mail up until a few days before this accident occurred. (R. 17, R. 107). In the latter part of November, 1952, the Petitioner's immediate superior at Monahans, the witness, Higginbothan, told the Petitioner that she had to handle the mail, and that she had to handle the mail alone. (R. 18, 44). Mrs. Thomson told her superior at that time that the laborer Vasquez had been handling the mail, and that she could not handle the mail and wear skirts and hose as she had been instructed to do. (R. 18). Those instructions had been given by the Assistant Superintendent of the division who was Higginbothan's superior as well as Petitioner's. (R. 17). She was told by Higginbothan that she had hired out to do a man's job, was receiving the same pay and those were the duties that he saw fit to assign her. (R. 18). Higginbothan did *not* complain that that the trains had been delayed or that the mail had not been satisfactorily handled.

Handling the mail meant pulling a cart (Def. Ex. 1, R. 36, 37), loaded with bags of mail out to the waiting train. Petitioner then had to pick up the bags of mail weighing from fifty to seventy-five pounds each

off the floor of the car, bounce them on her knee and onto the floor of the R. P. O. car. She then picked up the incoming mail off the floor of the railroad car and swung it over onto the mail cart .(R. 28, 30). The loaded mail cart was then pulled back to the mail room of the station. Several days after the conversation with Higginbothan, while Petitioner was in the middle of loading and unloading some twelve or fifteen of these bags of mail, she felt a sudden nausea and dizziness. As she got down from the cart and started pulling it back to the station, she felt a sharp pain in her back, and her disability followed. (R. 31).

The jury in the Trial Court returned a verdict for the Petitioner for $5,700.00, and a judgment was entered accordingly. The Court of Appeals for the Fifth Circuit reversed and rendered the judgment on the grounds that Petitioner had failed to present any evidence to support the jury verdict.

SUMMARY OF ARGUMENT

Congress and this Court have combined to grant the injured employee a right to trial by jury on the issue of negligence. Their efforts have been directed toward freeing the injured employee from narrow interpretations and nice distinctions such as those on which this opinion of the lower Court rests.

POINT ONE (RESTATED)

1. The direct order to Petitioner to handle the mail alone in violation of custom and the foreseeable consequences of that order were factors which the jury, and not the Appellate Court, should evaluate.

The opinion of a Court is a concrete example of its philosophy of the law with respect to a given class of cases. Each opinion, therefore, represents much more than a decision on a given set of facts. It represents the thinking of the men who form that Court with respect to a field of law. A comparison of the opinion rendered by the Fifth Circuit in the case at bar with the line of decisions handed down by this Court in cases arising under the Federal Employers' Liability Act since the 1939 Amendment will reflect that the philosophy of the Fifth Circuit is in conflict with the rules of interpretation laid down by this Court. This is a case in which a jury verdict was overturned by the Fifth Circuit on a re-evaluation of the evidence. The very words of the opinion are words used in other arguments before this Court, and heretofore rejected or modified by this Court. The opinion contains the proposition that:

> "under the simple terms of the Federal Employers' Liability Act negligence is the basis of liability. The railroad here was not an insurer of plaintiff's safety, and before recovery can be had plaintiff must show by the evidence that her injury was the proximate result of the railroad's charge negligence." (R. 192).

In the case of *Wilkerson vs. McCarthy*, 336 U. S. 53, (1949), 69 S. Ct. 413, this Court, speaking through Mr. Justice Black, said:

> "That proposition is correct, since the act imposes liability only for negligent injury, Cf. *Coray vs. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reason-

able and prudent person would have done under the same circumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain under the circumstances,' bearing in mind that 'the standard of care must be commensurate to the dangers of the business'. *Tiller vs. Atlantic Coast Lines Ry. Co.*, 318 U. S. 54, 67, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. A. 967." (P. 61).

The evolution of the employee's right to recovery for industrial injuries from the common law by statute was carefully traced by this Court in the case of *Tiller vs. Atlantic Coast R. Line*, 318 U. S. 54; 63 S. Ct. 444; 87 L. Ed. 610, 143 A. L. R. 967 (1943). The last major change in the Act was wrought by the 1939 amendment which completely abolished the defense of assumption of risk. The Tiller case arose after that amendment and was the first occasion by this Court for a discussion of the impact of that amendment. The Congressional intent was carefully noted and Congressional evaluation of the situation existing prior to the 1939 amendment was summed up in the following words from the report of the Senate Committee on Judiciaries 76 Cong., First Sess., Rept. No. 661, Page 4,

"The present rule apparently ignores the fact that the master, and not the servant, has control over the conditions which affect the safety of the employees . . . The existing rule not only permits the employer to be careless about the conditions of his premises, but, in effect, places a premium upon his carelessness . . .

"Under present economic conditions, employees must, of necessity, continue to work under unsafe conditions, or frequently sacrifice the

fruits of many years of accumulated seniority, go on relief, or beg their bread."

By the passage of this amendment the emphasis was finally and completely shifted from the action of the employee to the actions of the employer. With the substitution of comparative negligence for the doctrine of contributory negligence as a bar, and the complete abolition of the defense of assumption of risk, the criterion in such cases became whether or not the employer had been guilty of any negligence and no action or failure to act on the part of the employee would operate as a bar to his recovery. No longer can the employer by uttering the magic formula "this was the custom" absolve itself from the effects of his own negligence.

The evidence of custom in this case was conflicting. Obviously the custom would vary at different stations along the railroad lines due to the quantity of mail involved. The custom with reference to handling the large amount of mail arriving at a town like Dallas, for instance, would not be the same as that prevailing at a small town like Monahans where the Petitioner worked. Petitioner testified that due to a company policy put into effect several months before she went to the station where she was injured, she had been wearing female attire which made it impossible for her to climb up on the mail trucks and actually handle the mail. (R. 15, 16). Up until several days prior to her injury the mail at Monahans had been handled by a Mexican laborer. (R. 16, 105). According to the testimony of the Respondent's witnesses, it was at all times her duty to assist in handling the mail, but there were other employees assigned to the job also. (R. 90).

Petitioner further testified that a few days prior to the injury her instructions were changed by her immediate superior and she was told that she had to handle the mail alone; that she had hired out to do a man's work and she was going to do it. (R. 18, 44). Regardless of what the custom had been, it was undisputed that the Petitioner handled the mail alone on the morning of her injury, and from this circumstance itself the jury had the right to infer that there was negligence in requiring one person to handle the bags weighing fifty to seventy-five pounds each alone. The lower Court concluded, however, on the record that it was the usual custom for Petitioner to handle the mail alone and that, therefore, no negligence had been shown. (R. 189).

In the Tiller case the lower Court stressed the fact that there had been no departure from custom which occasioned the employee's injury and came to the conclusion that Congress did not intend to increase the master's responsibility to use due care toward his employees. In answer to this contention, this Court said:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U. S. C. A. § 1, et. seq., 'unless great care be taken the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name' and no such result can be permitted here." *Tiller vs. Atlantic Coastline R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943).

In the words of the Fifth Circuit's opinion in the case at bar exactly the same argument is advanced; that is, that if it was normal and customary for an operator to handle the mail, the employer cannot be guilty of negligence in requiring the operator to handle the mail alone in spite of the fact that help was available which would have minimized the risk to the employee.

The lower Court dwells on the fact that according to their analysis of the record Petitioner failed to suggest to the railroad that the method of doing the work was improper, or that other workmen would have been of assistance to her. The lower Court in effect held that she could not recover because she did not protest in sufficiently strong terms. Again this represents the improper emphasis on the employee's actions rather than on the action of the employer. These circumstances which the lower Court says that the Petitioner failed to point out to her employer were matters over which the employer rather than she had control. Failure to protest can have no bearing on whether or not the action to be protested was negligent or not. It could at most amount to assumption of risk, which, of course, is no longer a defense under the statute. The jury had the right to infer negligence from the fact that the employer allowed her to continue performing a task which could reasonably be foreseen to be beyond her strength. *Comisky vs. Penn. R. R. Co.*, 228 F. 2d 687 (2 C. A., 1956).

There is the additional factor that the Petitioner was a woman, hired to perform duties largely clerical in nature. The duty of handling the mail required nothing more than a strong back. This Court has held that the

employer was bound to consider the likelihood of injuries peculiar to women by reason of their sex and to use reasonable measures to prevent same. *Lillie vs. Thompson,* 332 U. S. 459; 68 S. Ct. 140 (1947). By the same token this employer should have foreseen the possibility of just such an injury as Petitioner received from requiring her to do "man's" work. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. As stated by this Court in the case of *Patton vs. Texas & Pacific Ry. Co.,* 179 U. S. 658, 664, 21 S. Ct. 275, 277, and re-affirmed by this Court in the case of *Bailey vs. Central Vermont Ry., Inc.,* 319 U. S. 350; 63 S. Ct. 1062-1064.

> "It is a duty which becomes 'more imperative' as the risk increases."

POINT TWO (RESTATED)

2. The strict limits applied by the Court of Appeals to Petitioner's cause of action violate the rules of substance and procedure laid down by this Court.

The facts in this case are very similar to those in the case of *Blair vs. Baltimore & O. R. Co.,* 323 U. S. 600; 65 S. Ct. 545; 89 L. Ed. 490 (1945). There the claimant was injured while attempting to unload some heavy pipes. He had previously told his superior that they did not have enough men. The superior told him to go ahead and do the work or they would get somebody who could. This in effect was the same type of direct order given by Petitioner's superior when she was ordered to handle the mail alone. After outlining the circumstances from which the jury could have inferred negligence in that case, the Court said, at Page 604:

"We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury 'in whole or in part.' Consequently, we think the jury, and not the Court, should finally determine these issues.

The case at bar also closely resembles *Stone vs. New York, Chicago and St. Louis Ry. Co.*, 344 U. S. 407; 73 S. Ct. 358 (1953). The claimant in that case suffered a back injury as a result of pulling too hard on a railroad tie under the direct order of the straw boss. In pointing out that the straw boss had additional men who could have been put on the job, this Court said:

"We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. *Wilkerson vs. McCarty*, 336 U. S. 53, 61; 69 S. Ct. 413, 417; 92 L. Ed. 497. To us it appears to be a debatable issue on which fair minded men would differ. *Cf. Bailey vs. Central Vermont Railway Co.*, 319 U. S. 350, 353; 63 S. Ct. 1062, 1064; 87 L. Ed. 1444; *Urie vs. Thompson*, 337 U. S. 163, 178; 69 S. Ct. 1018, 1028; 93 L. Ed. 1282."

The cases cited above are all links in the chain woven by this Court starting with the Tiller case of 1943, and coming down to the present in which this Court has jealously guarded the right of an employee to a jury evaluation of the negligence of his employer which occasions an injury. This steady unbroken chain of interpretation was ignored by the Fifth Circuit in its opinion on this case. The last link in this chain was forged during the last term of Court in the opinion of

Schulz vs. Penn Ry. Co., 350 U. S. 523; 76 S. Ct. 608 (1956). The facts in this case and in the Schulz case are not similar, but there, as here, the Petitioner has the right to recover, if the injury resulted "in whole or in part" from the Respondent's negligence. The Schulz case was one arising under the Jones Act which made the Federal Employers' Liability Act available to seamen. This Court held:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct precise evidence, such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre, but measuring negligence is different. The definitions of negligence are not definitions at all strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done or failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact why it should not decide such questions as these as well as others.' *Jones vs. East Tennessee V. & G. Ry. Co.* 1888, 128 U. S. 443, 445; 9 S. Ct. 118; 32 L. Ed. 478." Page 525.

The Court of Appeals attempted to distinguish the Stone case, the Blair case and the Bailey case by saying that in those cases protest was made immediately before the injury. The Court of Appeals, however, does not make clear whether it is ruling that Petitioner's

cause of action fails because of a variance between pleadings and proof or whether Petitioner's cause of action as proved, fails to establish negligence. The evidence of Petitioner's conversation with her superior and his instructions to perform the handling of the mail, was admitted without objection. Under the provisions of Rule 15-B, of the Federal Rules of Civil Procedure, issues tried by consent are to be treated as though they had been raised in the pleading, and a failure to amend the pleading so as to conform to the proof does not affect the result of trial of those issues.

If the Court is ruling as a matter of substantive law that the claimant cannot recover because she failed to protest on the morning of the injury, though she had made an unsuccessful protest several days before, then the Court is setting up a distinction without a difference. It has said that she may not recover because she was not injured the first time she attempted to carry out duties negligently assigned to her, but was hurt the second or third time she attempted to carry out those duties. Such a strict construction is completely inconsistent with the line of cases decided by this Court and cited above.

The opinion in the Schulz case was published by this Court after the decision was handed down by the Fifth Circuit Court in the case at bar and was strongly urged by this Petitioner in her motion for rehearing before that Court. The other cases cited above were again reemphasized. Petitioner's motion for rehearing was overruled without opinion. Failure to correct the opinion in the present case will not only deprive this Petitioner of her constitutional and statutory right to a trial by jury, but will result in a deprivation of those

same rights to other employees with cases arising under the Federal Employers' Liability Act whose injuries occur within the jurisdiction of the Fifth Circuit Court of Appeals. It will result in one law with two interpretations. The one interpretation being given it in those jurisdictions which adhere to the ruling of this Court, and the second interpretation being given in the geographical limits of the Fifth Circuit. The opinion of a Court is a manifestation of that Court's principles, and only by a correction of an individual opinion can this Court exercise its constitutional function of guidance to the lower Courts.

CONCLUSION

Since the Tiller case, this Court has said in many cases in many ways the same thing—that the issue of negligence is one to be decided by juries under proper charge of the Court. The opinion of the Court of Appeals in the present case is at variance with the opinions of this Court, and the social and economic and statutory factors on which these decisions rest. We earnestly submit that the opinion of the Circuit Court should be reversed and the judgment of the trial Court reinstated.

Respectfully submitted,

DALLAS SCARBOROUGH
DAVIS SCARBOROUGH
BEVERLY TARPLEY
Counsel for the Petitioner

I hereby certify that copy of the above and foregoing brief on the merits was served on J. B. Look, Jr., attorney of record for the Respondent by depositing same in the United States mails addressed to him at the Citizens National Bank Building, Abilene, Texas, this the.....day of February, 1957, in accordance with Paragraph I, of Rule 33, of the Supreme Court Rules.

Davis Scarborough

Attorneys for Petitioner.